

1 DAVID D. LAWRENCE, State Bar No. 123039
dlawrence@lbaclaw.com
2 DENNIS M. GONZALES, State Bar No. 59414
dgonzales@lbaclaw.com
3 NATHAN A. OYSTER, State Bar No. 225307
noyster@lbaclaw.com
4 LAWRENCE BEACH ALLEN & CHOI, PC
100 West Broadway, Suite 1200
5 Glendale, California 91210-1219
Telephone No. (818) 545-1925
6 Facsimile No. (818) 545-1937

7 Attorneys for Defendant
Burbank Police Department Officer Gunn
8

9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**
11

12 PRESTON SMITH, an individual;

13 Plaintiff,

14 vs.
15

16 CITY OF BURBANK; BURBANK
17 POLICE DEPARTMENT;
BURBANK POLICE DEPARTMENT
18 OFFICER GUNN; BURBANK
POLICE DEPARTMENT OFFICER
19 BAUMGARTEN; BURBANK
POLICE DEPARTMENT OFFICER
20 EDWARDS; AND DOES 1
THROUGH 100, INCLUSIVE
21

22 Defendants.
23

Case No. CV 10-8840 VBF (AGR_x)

Honorable Valerie Baker Fairbank

**REPLY BRIEF IN SUPPORT OF
OFFICER GUNN'S MOTION FOR
JUDGMENT ON THE PLEADINGS**

Date: May 16, 2011

Time: 1:30 p.m.

Courtroom: 9

24 TO THE CLERK OF THE COURT, ALL INTERESTED PARTIES AND
25 THEIR ATTORNEYS OF RECORD:

26 //

27 //

28 //

1 Defendant OFFICER GUNN (hereinafter “Officer Gunn”) hereby submits
2 the following Reply Brief of Memorandum of Points and Authorities in support
3 of Officer Gunn’s Motion for Judgment on the Pleadings.
4

5 Dated: May 2, 2011

LAWRENCE BEACH ALLEN & CHOI, PC

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8 By /s/ Nathan A. Oyster
Nathan A. Oyster
9 Attorneys for Defendant
Burbank Police Department Officer Gunn
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION.**

3 This case relates to the April 10, 2009 arrest of Plaintiff Preston Smith.
4 Following his arrest, Plaintiff pled guilty to violating California Penal Code §
5 148(a)(1) – interfering with a peace officer in the lawful performance of his
6 duties. Plaintiff also pled guilty to the possession of a controlled substance.

7 Plaintiff’s Complaint alleges that Officer Gunn and other officers with the
8 Burbank Police Department used excessive force against him during the course of
9 the arrest. The Complaint is barred as a matter of law by the doctrine set forth in
10 *Heck v. Humphrey*, because any finding in favor of Plaintiff would necessarily
11 invalidate the Plaintiff’s criminal conviction.

12 As discussed in detail below, Plaintiff’s criminal conviction was for **all** of
13 the events in which he interacted with Officer Gunn prior to his arrest. Plaintiff’s
14 conviction is based on his fleeing from Officer Gunn, his physical resistance to
15 Officer Gunn and other officers from the Burbank Police Department, and
16 Plaintiff’s striking and attempts to strike officers from the Burbank Police
17 Department. Because the criminal record is so comprehensive as to show that all
18 of the events are subject to Plaintiff’s criminal conviction, all of Plaintiff’s claims
19 are barred.

20 Plaintiff’s opposition relies heavily on the recent Ninth Circuit opinion of
21 *Hooper v. County of San Diego*, 629 F.3d 1127 (9th Cir. 2011). The opposition
22 argues that the sole basis for Plaintiff’s criminal conviction occurred when he ran
23 from Burbank police officers. This contention is in direct contravention to the
24 explicit language from the underlying criminal case, which established three
25 specific factual bases for Plaintiff’s criminal conviction. Because Plaintiff is
26 directly challenging two of the three bases for his criminal conviction, *Hooper*
27 does not support Plaintiff’s position and the bar of *Heck v. Humphrey* applies to
28 this action.

1 **II. BECAUSE THE OPPOSITION DEMONSTRATES THAT**
 2 **PLAINTIFF IS CHALLENGING THE BASIS FOR HIS CRIMINAL**
 3 **CONVICTION, ALL OF HIS CLAIMS ARE BARRED BY *HECK V.***
 4 ***HUMPHREY.***

5 As set forth in the moving papers, “[w]hen a plaintiff who has been
 6 convicted of a crime under state law seeks damages in a § 1983 suit, the district
 7 court must consider whether a judgment in favor of the plaintiff would
 8 necessarily imply the validity of his conviction or sentence.” *Hooper v. County of*
 9 *San Diego*, 629 F.3d 1127, 1130 (9th Cir. 2011) (internal quotations and citations
 10 omitted). “If the answer is yes, the suit is barred.” *Id.*

11 Plaintiff’s opposition relies on *Hooper*, but that case does not support
 12 Plaintiff’s position. In *Hooper v. County of San Diego*, the plaintiff pled guilty to
 13 a violation of California Penal Code § 148(a)(1). *Id.* at 1129. The plaintiff was
 14 arrested on suspicion of petty theft and for possession of methamphetamines. *Id.*
 15 She did not dispute the lawfulness of her arrest, nor did she dispute that she
 16 resisted arrest. *Id.* Instead, she contended that the arresting officer used
 17 excessive force in response to her arrest. *Id.* In *Hooper*, a police dog eventually
 18 bit the plaintiff’s head on two occasions during a struggle following her arrest.
 19 *Id.*

20 In this action, Plaintiff is challenging the factual basis for his criminal
 21 conviction. As clearly outlined in the moving papers, there are three distinct
 22 factual bases for Plaintiff’s criminal conviction. The criminal complaint
 23 specifically alleged that Plaintiff committed the following acts of resistance:

- 24 • Plaintiff ran from Officer Gunn during a lawful detention and despite
 25 orders to stop. Criminal Complaint [Ex. “A” to RFJN in support of the
 26 Motion] at 1.
- 27 • Plaintiff used elbows and hands in a fist to strike Officer Baumgarten,
 28 Officer Edwards, Officer Joel, Officer Rodriguez, and Officer Gunn

1 during the officers' attempt to lawfully restrain Plaintiff. *Id.*

- 2 • Plaintiff flailed arms and kicked legs when Officer Baumgarten, Officer
3 Edwards, Officer Joel, Officer Rodriguez, and Officer Gunn tried to
4 detain him. *Id.* at 1-2.

5 The documents in the underlying criminal file show that Plaintiff's plea
6 was not limited in any manner. By pleading guilty to violating California Penal
7 Code § 148(a)(1), he pled guilty to all of the facts alleged against him.

8 In his opposition, Plaintiff is directly challenging two of the three factual
9 bases for the conviction. In his own declaration, Plaintiff claims that he
10 "remained face down on the ground and [he] did not attempt to move or stand up"
11 after he was apprehended by the officers. Declaration of Preston Smith, ¶ 3.
12 Furthermore, he contends that "he resisted arrest by fleeing the officers" but "he
13 was tasered even though he was under their physical control and was not resisting
14 arrest." Opposition at 14:11-16. Because Plaintiff contends that he did nothing to
15 violate California Penal Code § 148(a)(1) other than run from the police, he is
16 directly challenging two of the three factual bases for his criminal conviction.
17 Therefore, any finding in Plaintiff's favor in this litigation would necessarily
18 imply that his criminal conviction was invalid, which warrants the dismissal of
19 Plaintiff's claims.

20 **III. PLAINTIFF'S REQUEST FOR A CONTINUANCE OF THE**
21 **HEARING SHOULD BE DENIED.**

22 On February 28, 2011, the parties filed a Stipulation with the Court
23 requesting a stay of the action due to a pending criminal investigation by the Los
24 Angeles Sheriff's Department. Docket No. 19. In the Stipulation, the parties
25 explained their competing position on the issue of whether the Court should hear
26 the *Heck* motions while the case was stayed.

27 Defendants contended that the "*Heck* motions will be based upon the
28 pleadings in this action and the court file in the underlying criminal action against

1 Plaintiff PRESTON SMITH” and “that Plaintiff does not need to conduct
2 discovery to oppose the *Heck* motions.” Docket No. 19, ¶ 9. Plaintiff contended
3 that “the depositions of the individual Defendants must be completed before
4 Plaintiff can oppose the *Heck* motions.” *Id.*, ¶ 10. The Court’s Order contained
5 the language proposed by Defendants, which scheduled the Motions for May 16,
6 2011.

7 Additionally, the only basis for Plaintiff’s *Ex Parte* Application is his
8 contention that Rule 56(d) of the Federal Rules of Civil Procedure applies.
9 Officer Gunn’s Motion is a motion for judgment on the pleadings, which is
10 brought pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. The court
11 may consider, on a motion for judgment on the pleadings, the facts alleged in the
12 pleadings as well as those contained in judicially noticed materials. *Heliotrope*
13 *Gen., Inc. v. Ford Motor Co.*, 189 F.3d 971, 981, n. 18 (9th Cir. 1999). Because
14 Officer Gunn’s reliance on materials contained in the underlying criminal file has
15 not converted the Motion into a Rule 56 motion, Plaintiff’s request to continue
16 the Motion for the purpose of conducting discovery should be denied.

17 **IV. CONCLUSION.**

18 For the foregoing reasons, Officer Gunn requests that the Court grant
19 judgment on the pleadings in favor of Officer Gunn.

20
21 Dated: May 2, 2011

LAWRENCE BEACH ALLEN & CHOI, PC

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23
24 By /s/ Nathan A. Oyster
Nathan A. Oyster
25 Attorneys for Defendant
Burbank Police Department Officer Gunn
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